No. 87-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

—v.—

ABORTION RIGHTS MOBILIZATION, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CIVIL LIBERTIES UNION, NATIONAL ORGANIZATION FOR WOMEN, CATHOLICS FOR A FREE CHOICE, AND NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members. The New York Civil Liberties Union (NYCLU) is its statewide affiliate. The ACLU was founded in 1920 as an organization dedicated to the defense of individual rights. In pursuit of that goal, the ACLU frequently appears in federal courts throughout the country. The continued availability of the federal courts as a meaningful forum for constitu- tional litigation is a major institutional concern of the ACLU.

The National Organization for Women, Inc. (NOW), founded in 1966, is a national

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1/ Letters of consent pursuant to Rule 36.2 have been filed with the Clerk of the Court.

membership organization of 160,000 women and men in over 750 chapters throughout the country. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion, and believes that access to the courts is an important means of preserving that right.

Catholics For a Free Choice (CFFC) is a national educational organization established in 1973 that supports the right to legal reproductive health care, including family planning and abortion. As an organization of Catholics, CFFC supports policies of strict separation of church and state, based not only on the U.S. Constitution, but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatif Humanae, 7 December 1965), which declares: " . . . the civil authority must see that the equality of

citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

The National Emergency Civil Liberties Committee (NECLC) is a not-for-profit organization dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time, NECLC submits amicus curiae briefs to the courts when it believes issues of particular import for civil liberties are at stake.

The contention that respondents lack standing to bring the underlying lawsuit

against IRS is based, in amici's view, on an unduly narrow conception of federal jurisdiction under Article III. Amici are especially troubled by what we perceive as petitioners' attempt to expand the prudential limitations on Article III standing.2/ We believe that petitioners' position in this case reflects a basic misunderstanding of the relationship between the concept of standing and the notion of separation of powers.

The purpose of this brief is to explore that relationship. To avoid burdening the Court with repetitious argument, amici have only briefly addressed certain other aspects of the standing

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2/ Unless otherwise indicated, the term "petitioners" is used throughout this brief to include the federal defendants who, although technically aligned as respondents, in fact support petitioners' standing argument.

inquiry. Amici nonetheless endorse the conclusion of both courts below that respondents' standing is adequately established by the allegations of their complaint.

SUMMARY OF ARGUMENT

In Allen v. Wright, 468 U.S. 737, 752 (1984), this Court observed that the requirement of standing is based on "the idea of separation of powers." The Allen Court also noted, however, that "the idea of separation of powers" finds expression in a variety of legal doctrines that are quite separate and distinct from the standing question. Id. at 750.

It is, therefore, wrong to assume that every concern about separation of powers automatically translates into a concern about standing. Yet petitioners

make precisely that error in their effort to raise prudential objections to respondents' standing in this case.

Resting on a very generalized statement of the separation of powers, petitioners argue that the provisions of the Internal Revenue Code should be enforced by IRS and not by the courts. No one quarrels with that statement, so long as IRS is complying with congressional guidelines. In this case, however, the allegation is that IRS is not complying with its congressional mandate. Under those circumstances, it has traditionally been the role of the courts to see that the laws are faithfully executed and that individuals who suffer the consequence of unlawful action are not left without remedy.

In similarly misguided fashion, petitioners assert that the federal courts should not take over the day-to-day operation of administrative agencies except in the most extraordinary circumstances. Again, that misstates what this case is about. Respondents have challenged an administrative decision to grant tax exempt status to the Catholic Church despite its alleged political activities. Proving that claim may involve substantial discovery. But if that discovery reveals a legal violation, the appropriate remedy hardly requires a judicial takeover of IRS. The fact that this is a "big" case does not, by itself, render it non-justiciable.

Petitioners also rely on the concept of prosecutorial discretion to suggest the inappropriateness of respondents' suit. The defense of prosecutorial discretion,

however, does not respond to the issue of standing. Moreover, respondents allege in their complaint that IRS has misapplied the law in a politically biased fashion. That assertion, which must be accepted as true at this stage of the proceedings, is sufficient to overcome a claim of prosecutorial discretion, even in a more traditional law enforcement context.

Finally, petitioners argue that respondents' complaint amounts to nothing more than a generalized grievance that should be addressed to the political branches. Although this Court has held that a mere generalized grievance does not confer standing, that concern is inapplicable on the facts of this case. First, the record as it now stands alleges more than a mere generalized grievance. Second, and more significantly, the

separation of powers principle that ordinarily channels political disputes into the political system cannot be rigidly enforced, through standing doctrine or otherwise, when the legal claim is that the political system has itself been skewed in favor of one side to the dispute, thereby diminishing the possibility of political redress.

ARGUMENT

ASSUMING RESPONDENTS MEET THE CONSTITUTIONAL REQUIREMENTS FOR ARTICLE III STANDING, THERE ARE NO PRUDENTIAL REASONS TO DISMISS THEIR COMPLAINT ON STANDING GROUNDS

Petitioners' effort to erect a prudential barrier to respondents' standing in this case rests on the misapplication of two undisputed principles. First, petitioners correctly assert that the standing doctrine articulated in this

Court's decisions "subsumes a blend of constitutional requirements and prudential considerations." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Second, petitioners cite this Court's decision in Allen v. Wright, 468 U.S. 737, 752 (1984), for the proposition that "the law of Article III standing is built on . . . the idea of separation of powers."

The flaw in petitioners' logic lies in its conclusions rather than its premises. Specifically, the prudential aspect of petitioners' standing argument proceeds something like this: standing includes prudential considerations; standing also reflects separation of powers concerns; therefore, all separation of powers concerns can be incorporated into the

standing inquiry. It is a classic case of faulty reasoning, akin to arguing that elephants and humans are identical since both are mammals.

Allen v. Wright hardly supports such a strained result. To the contrary, Allen specifically notes that the requirement of standing is only one of a series of "doctrines that cluster about Article III," including "ripeness, political question, and the like." 468 U.S. at 750, quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178 (D.C.Cir. 1983)(Bork, J., concurring). All of these doctrines may share a common heritage to the extent that each represents an effort to reconcile the role of the judiciary in a representative government. Id. But each of these doctrines has also developed its unique own set of defining rules.

For example, the central inquiry in political questions cases is whether a legally-framed dispute has been textually committed to another branch of government and, if not, whether there are judicially manageable standards for resolving it. E.g., Baker v. Carr, 369 U.S. 186, 217 (1962). This issue may arise in a case that also raises standing problems. But it is obviously distinct from the question of whether the party seeking relief has alleged "a personal stake in the outcome of the controversy." Id. at 204. See also Flast v. Cohen, 392 U.S. 83, 100-01 (1968) (distinguishing between standing and the political question doctrine as separate aspects of Article III justiciability).

In one sense, of course, the proper relationship between the idea of separation of powers and the doctrine of standing was

expressly debated by this Court in Allen v. Wright. However, the majority's conclusion that the requirements of standing must be understood in light of the principle of separation of powers, 468 U.S. at 761-62 & n.26, falls far short of a holding that the two doctrines are functionally indistinguishable.

Writing for the Court in Allen, Justice O'Connor specifically recognized that the standing determination in any particular case must be rooted in the allegations of the complaint. In Allen itself, the Court concluded that the generalized grievance stated in plaintiffs' complaint either could not be remedied by the judicial branch or, alternatively, could only be remedied by "a restructuring of the apparatus established by the

Executive Branch to fulfill its legal duties." 468 U.S. at 761.

Upon those distinctive facts, the Allen Court held that standing could not be conferred without violating the principle of separation of powers inherent in Article III.[3/] Allen does not hold that every objection to a complaint that can be framed in separation of powers terms is, ipso facto, relevant to the standing inquiry.

3/ The basis for the Court's conclusion in Allen is somewhat ambiguous. Under well-settled law, the three criteria for constitutional standing are personal injury, causation, and redressability. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976). In Allen, the Court expressed concern about all three elements. The Court also expressed concern about the intrusiveness of any judicial remedy. However, as various commentators have noted, the requested relief would have been just as intrusive even if causation were clearly established. E.g., Nichol, "Abusing Standing: A Comment on Allen v. Wright," 133 U.Pa.L.Rev. 635, 646 (1985). Thus, it is not entirely clear what the Court meant when it said that the scope of the remedy is relevant to the determination of causation.

The danger of that approach, which petitioners at least implicitly advocate in this case, is that it "obscure[s]" the multifaceted nature of the justiciability question under Article III. See Tushnet, "The Sociology of Article III: A Response to Professor Brilmayer," 93 Harv.L.Rev. 1698, 1726 (1980). In so doing, it undermines the principle of separated powers that it purports to promote by increasing the likelihood that the federal courts will, through a process of unexamined erosion, forfeit their role in protecting individual rights against official overreaching. See generally, Tribe, American Constitutional Law §3-14 (1988).

A. The Relief Requested By Respondents In This Case Does Not Unduly Intrude On Executive Authority To Enforce The Law

Relying on Allen v. Wright, petitioners contend that the complaint in this case should be dismissed on standing grounds. According to petitioners, the relief requested by respondents violates the principle of separation of powers because, if granted, it would require IRS to "restructure" its enforcement apparatus under §501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3).

As demonstrated below, petitioners' characterization of the lawsuit is factually inaccurate. See pp.22-24, infra. Legally, petitioners' separation of powers argument, even assuming it is relevant to the standing inquiry, vastly overstates the applicable law.

Public officials are frequently directed to "restructure" their activities if necessary to conform to statutory or constitutional requirements. Our system of government demands no less. In the famous words of Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Moreover, there are numerous instances in which this Court has insisted on a dramatic "restructuring" of government programs in order to secure compliance with the law. School desegregation, see Brown v. Board of Education, 347 U.S. 483 (1954), and redistricting, see Reynolds v. Sims,

377 U.S. 533 (1964), are only two examples of this phenomenon.4/

It is simply impossible, therefore, to read Allen v. Wright as holding that standing must be denied whenever the requested relief would require the government to "restructure" its activities. And indeed, the Court expressly noted in Allen that it did not accept "the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." 468 U.S. at 761 n.26.

4/ As Justice Stevens observed in his dissenting opinion in Allen v. Wright, 468 U.S. at 792 n.10: "[S]tanding doctrine has never stood as a barrier to such 'restructuring.'" Admittedly, neither Brown nor Reynolds involved the "restructuring" of a federal program. However, the Allen majority did not rely on this federal-state distinction in its discussion of separation of powers. See 468 U.S. at 760.

The line between judicial abdication and judicial usurpation is not easy to find amidst these conflicting signposts. Recognizing this dilemma, Allen largely abandons the search for a universal formula to determine standing.5/ Thus, even under Allen, petitioners' repeated and quite generalized insistence on the need to preserve administrative independence is not particularly helpful. Rather, Allen emphasizes, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the

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5/ "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge, 454 U.S. at 475.

particular claims asserted." 468 U.S. at 752.

In short, it is critical to look at the facts. For obvious reasons, petitioners take a far less detailed approach. Minimizing any differences between Allen and this case, petitioners stress that both cases involved a challenge to the tax enforcement policies of IRS. Thus, petitioners argue, if the requested relief in Allen was too intrusive to permit standing, the result in this case must be the same. The two cases, however, are easily distinguishable, even when measured on the uncertain scale of judicial intrusiveness.

Plaintiffs in Allen brought a nation-wide class action alleging that IRS was failing to enforce its own regulations denying tax exempt status to racially

segregated private schools. Plaintiffs further alleged that the existence of these white academies frustrated efforts to desegregate the public schools that plaintiffs' children attended. The class definition reflected this broad legal theory. It embraced several million black children living in school districts that were, or someday might be, subject to judicial desegregation orders. 468 U.S. at 743.

The scope of the relief corresponded to the scope of the class in Allen. Thus, plaintiffs' complaint was not directed at specific schools, although specific schools were named in the complaint as illustrative of the problem. Id. at 744. Rather, plaintiffs sought an injunction compelling IRS to develop and implement procedures for identifying racially discriminatory schools

anywhere in the country that were improperly receiving the benefits of tax exemption.

This Court clearly believed that supervision of that decree would have required a significant degree of judicial monitoring. As the Court noted:

> [Plaintiffs'] complaint, which aims at nationwide relief and does not challenge particular identified unlawful IRS actions, alleges no connection between the asserted desegregation injury and the challenged IRS conduct sufficient to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures.

468 U.S. at 766. See also Rizzo v. Goode, 423 U.S. 362 (1976).

The complaint in this case is substantially different. Unlike Allen, its challenge is limited to "particular identified unlawful IRS action." Moreover, a judicial order requiring IRS to rescind the tax

exempt status of the Catholic Church so long as it engages in political activity would not require the sort of intrusive supervision that troubled the Allen Court. Indeed, the prohibitory injunction plaintiffs seek here would be relatively straightforward, assuming the allegations in their complaint could be proved.

In an effort to create a closer fit between this case and Allen, petitioners have noted that there are thousands of local parishes and schools that receive the benefit of the Church's tax exempt status and that the activities of each of these entities are subject to examination if the lawsuit goes forward.

While that may be true for discovery purposes, it is not relevant to the remedial issue that petitioners have raised. IRS has granted the Catholic

Church a single, "umbrella" tax exemption.[6/] If that exemption is inappropriate because the Church or its constituent entities has engaged in prohibited political activity, only one tax exemption need be revoked. Unlike Allen, there is no need to develop new procedures that will then have to be applied to numerous other, unknown organizations. Nor is there any problem in identifying the alleged violator.

In short, plaintiffs neither seek nor require "an injunction to reform administrative procedures." Allen, 468 U.S. at 766. What they seek is an order directing IRS to enforce the law in one specific instance. The role of the courts

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6/ Gov't Brief at 2, n.1. The letter conferring this tax exemption is reprinted in the Joint Appendix at 24-27.

in determining the propriety of that order is no more intrusive than the role the courts played when an analogous order was challenged by the taxpayer in Bob Jones University v. United States, 461 U.S. 574 (1983).

B. The Concept of Prosecutorial Discretion Does Not Bar Relief In This Case

Petitioners' second prudential attack on respondents' standing in this case rests on a claim of prosecutorial discretion. In petitioners' view, the decision whether to enforce the provisions of the tax code against the Catholic Church is one for IRS officials alone and cannot be dictated by the courts.

In support of that proposition, petitioners rely on the following passage from Heckler v. Chaney, 470 U.S. 821, 831-32 (1985):

> [A]n agency decision not to enforce [the law] often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Chaney, of course, was not a standing case. It was a case construing the "committed to agency discretion" language of the Administrative Procedure Act, 5 U.S.C. §701(a)(2). Although petitioners minimize the importance of this distinction, it is in fact significant.

As the Chaney factors illustrate, the reviewability of prosecutorial decisions does not generally turn on the identity or stake of the person mounting the challenge. Indeed, most often the claim of prosecutorial abuse is raised by the alleged victim of the abuse, whose stake in the controversy cannot be disputed. Rather, the rationale for insulating enforcement decisions from judicial review is the lack of judicially manageable standards.

The rule of non-reviewability, however, is not absolute. Its limits were summarized by this Court in Wayte v. United States, 470 U.S. 598, 608 (1985)(citations omitted):

> [A]lthough prosecutorial discretion is broad, it is not "'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." In particular, the decision to prosecute may not be "'deliberately based upon an unjustifiable

> standard such as race, religion, or other arbitrary classification,'" including the exercise of protected statutory or constitutional rights.

In this case, respondents allege that the failure of IRS to revoke the tax exempt status of the Catholic Church reflects a conscious decision by government officials, whose subsidizing impact effectively supports the political agenda of those groups and individuals opposed to the constitutional holding of Roe v. Wade, 410 U.S. 113 (1973).

Accepting those allegations as true, Warth v. Seldin, 422 U.S. 490, 501 (1975), the government's unwillingness to enforce the provisions of the Internal Revenue Code in an evenhanded manner exceeds the permissible limits of prosecutorial discretion. That is so, moreover, precisely because the First Amendment requirement of

content-neutrality creates the judicially manageable standard lacking in most challenges to the exercise of prosecutorial discretion.

This Court has repeatedly held that the government's tax subsidies may not be "aimed at the suppression of dangerous ideas." Cammarano v. United States, 358 U.S. 498, 513 (1959); Speiser v. Randall, 357 U.S. 513, 519 (1958). Applying that principle in Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983), this Court upheld a statutory exemption that permitted lobbying by the Veterans for Foreign Wars, but not by other tax exempt organizations, upon "find[ing] no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect."

The record in this case does not permit a similarly benign finding. Whatever prudential concerns are embodied in the notion of prosecutorial discretion, therefore, do not apply here.

C. Respondents Should Not Be Required To Seek Relief From The Political Process When The Essence Of Their Claim Is That The Political Process Has Been Skewed In Favor Of Their Political Opponents

Petitioners' final and most substantial objection to respondents' standing rests on the prudential doctrine that federal courts should not adjudicate generalized grievances that are more properly addressed to the political branches. That doctrine, however, is inapplicable to this case for two reasons.

First, respondents' complaint alleges more than a mere generalized grievance, as the district court properly understood.

Second, the complaint in this case alleges a defect in the political process itself. For at least fifty years, this Court has recognized that the federal courts have an important role to play under these circumstances -- not in dictating the outcome of the political debate but in assuring that the debate proceeds according to fair rules.

Respondents seek nothing more from this lawsuit. Thus, it is true, as petitioners note, that respondents have not identified any candidates that have been defeated or any legislative battles that have been lost as a result of the tax exempt status conferred on the Catholic Church. But petitioners are wrong in arguing that the absence of these allegations demonstrates the lack of any injury-in-fact.

The injury-in-fact that respondents have suffered, assuming once again that the allegations of their complaint are accepted as true, is the necessity of fighting their political battle on an uneven playing field.7/ In conceptual terms, it is no different than a direct federal subsidy limited to anti-abortion candidates. Clearly, such a subsidy would be vulnerable to equal protection attack even if its challengers could not conclusively establish that any specific election was lost as the result of the government's improper bias.

For similar reasons, petitioners' causation argument is flawed. According to petitioners, the election or defeat of any

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7/ This brief does not address the separate issue of clergy standing, which respondents have also alleged.

candidate (even assuming that abortion was a major campaign issue), is the result of myriad decisions by individual voters that cannot be traced to any particular cause. That argument, however, proves too much. If accepted, it would mean that even a losing candidate could not challenge a campaign finance plan that was openly based on ideological concerns.

Here, as in Baker v. Carr, 369 U.S. 186, 208 (1962)(citations omitted),

> [respondents] are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law."

Petitioners attempt to distinguish Baker on the grounds that this is not an election case. The distinction is unpersuasive, however. In Baker and the reapportionment cases that followed, the

essential claim was that plaintiffs' vote was being diluted by malapportionment. Here, the essential claim is that respondents' vote is being diluted because the opposing side in the abortion debate has been granted a federal subsidy to seek electoral support. The result in each instance is an unfair distortion of the electoral system that can and should be remedied by the federal courts.

Using the language of separation of powers, petitioners' contend that any claim of political bias in the §501(c)(3) program must be addressed to the political branches and not to the judiciary. In fact, that argument undermines the very system of checks and balances that the separation of powers was meant to preserve.

As Professor Ely has written, the role of the courts in our constitutional system

may be analogized to the role of a referee, who "intervene[s] only when one team is gaining an unfair advantage, not because the 'wrong' team has scored." Ely, Democracy and Distrust 103 (1980). In United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), this Court made a similar point when it recognized, in now classic fashion, the indispensable role of the federal courts in ensuring the fairness and inclusiveness of "those political processes that can ordinarily be expected to bring about [relief] . . . ."8/

8/ Respondents' describe this as a case of alleged "competitor" standing. By failing to distinguish between economic and political competition, however, that description does not appreciably advance the analysis. At least since Carolene Products, the fairness of political competition has been recognized as an appropriate concern of the judiciary. By contrast, the fairness of economic competition is generally a matter for legislative determination.

This case involves precisely the situation envisioned by Carolene Products. Respondents are not complaining about the results of the political process but about the "unfair advantage" given their political opponents. They are entitled to have that claim heard and decided in federal court.

CONCLUSION

For the reasons stated herein, this Court should uphold respondents' standing to bring the underlying lawsuit, assuming that question is reached in this case.

Respectfully submitted,

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Dated: March 11, 1988